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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 73

NEW YORK CENTRAL RAILROAD COMPANY,
PETITIONER,

vs.

ANTONIA AMBROSE, AS ADMINISTRATRIX OF THE ESTATE OF JOHN AMBROSE, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

On May 6th, 1928, the respondent recovered judgment against petitioner in the Circuit Court of Hudson County, New Jersey, and the Court of Errors and Appeals, the highest Court of that State, affirmed the judgment on February 4th, 1929, solely by reason of

the equal division of that Court, six Judges voting to affirm and six to reverse. Because of the equal division of the appellate court no opinion was possible (R., p. 80, fol. 99 to p. 82, fol. 102; N. J. Advance Reports, Vol. 7, p. 347).

Upon affirmance of the judgment the record was remitted to the trial court. Petitioner filed its petition in this Court for a writ of certiorari on April 29th, 1929, and the writ was granted May 27th, 1929 (R., p. 82, fol. 103).

This action was brought under the Federal Employers' Liability Act to recover damages for the death of John Ambrose, Senior, respondent's intestate. His death was caused by an accident in a grain elevator operated by petitioner at Weehawken, New Jersey.

Petitioner is a common carrier, and as such it is engaged in interstate and intrastate commerce. It transported to the elevator in question, over railroads operated by it, shipments of grain, all of which originated outside the State of New Jersey. Some of the grain brought to the elevator was stored in storage bins and thereafter shipped to points outside the State of New Jersey, and some (a very small part) to points within that State (R., p. 55, fol. 62).

The Issue.

The charge against petitioner is that, without warning or notice to decedent, petitioner negligently and carelessly used certain poisonous gases in the elevator where decedent was employed; that while he was there engaged in interstate commerce he was overcome by

these gases, was thereby caused to fall into a shaft, and was killed (R., p. 1, fol. 2).

(The "shaft," so called in the complaint, is grain bin No. 81 in petitioner's elevator, in which decedent's dead body was found.)

Petitioner denies that at the time of the accident decedent was engaged in interstate commerce; denies the negligence complained of and alleges that decedent's injuries were occasioned by his negligence and his violation of petitioner's orders in going to the place where the accident happened, when it was obviously dangerous so to do (R., p. 2, fol. 3).

Errors Relied On.

At the close of plaintiff's case defendant moved for a nonsuit, and at the close of the entire case moved for a directed verdict in its favor. The trial court erroneously overruled both motions (R., p. 55, fols. 62-63; p. 64, fol. 72). These errors were stated as grounds of appeal (R., p. 78).

The motions so erroneously overruled were in part based upon the following grounds:

1. That at the time of the accident decedent was not engaged in interstate commerce.

2. That no negligence had been established against petitioner.

3. That the injuries resulting in decedent's death arose out of his own negligence.

4. That at the time of the accident decedent was not acting within the scope of his employment.

5. That decedent's injuries arose out of his disobedience of petitioner's orders.

(R., p. 55, fols. 62 and 63; p. 64, fol. 72.)

In this Court petitioner relies on these errors as grounds for reversal.

Grounds of Jurisdiction of This Court.

1. The Court of Errors and Appeals of New Jersey has decided federal questions of substance in a way probably not in accord with applicable decisions of this Court, to wit:

(*a*) The State Court erroneously decided that the evidence warranted a finding of negligence on the part of petitioner.

(*b*) The State Court erroneously decided that the evidence warranted a finding that at the time of the accident decedent was engaged in interstate commerce.

(*c*) The State Court erroneously decided that the evidence warranted a finding that decedent's death was not due to his own negligence.

2. Among the cases sustaining the jurisdiction of this Court, are:

Missouri Pacific R. R. Co. vs. Aeby, 275 *U. S.,* p. 426.

Toledo, St. Louis & Western R. Co. vs. Allen, 276 *U. S.,* p. 165.

Chicago, M. & St. P. R. Co. vs. Coogan, 271 *U. S.,* p. 472.

Gulf, M. & N. R. Co. vs. Wells, 275 *U. S.,* p. 455.

Summary of Facts.

Decedent had been employed by petitioner in its elevator at Weehawken for more than six years (R., p. 4, fol. 6). He worked on the "bin floor," a cement floor 300 feet long by 130 feet wide (R., p. 31, fol. 35). This floor covers the tops of the 291 grain bins in the elevator, of which 268 are storage bins and 23 are shipping bins (R., p. 59, fol. 66). In this floor are circular openings 17 inches in diameter into which are inserted the grain spouts or trollies which carry the grain into the bins. Access to these bins, when necessary, is had through rectangular manholes, 20 inches by 16¾ inches in size (R., p. 45, fols. 50-51). These manholes are located at the corners of the bins and across these corners are bolted iron bars which serve as the rungs of ladders reaching from the top to the bottom of the bins. These openings into the bins are covered with metal covers, which, when in place, rest on shoulders or flanges in the cement floor, and are level with the floor.

Exhibit P-2 (R. opposite p. 78) is a photographic view looking down from an opening in the bin floor into bin 81, where decedent's body was found.

Exhibit P-3 (R. opposite p. 79) is a photograph of a portion of the bin floor including the part which covers bin 81. This photograph shows the three circular spout holes of that bin with the covers removed, and the rectangular manhole with its cover on.

Bin 81 is about 85 feet deep (R., p. 9, fol. 11).

The grain is drawn out of the bin from an opening in the bottom (R., p. 7, fol. 9).

Dillworth was the foreman in charge of the bin floor (R., p. 4, fol. 5).

In general, decedent's duties were to sweep the floor and assist in setting spouts for the transfer of grain into the bins (R., p. 5, fol. 6; p. 17, fol. 20) and to do such other "floor work" as might be assigned to him by his foreman (R., p. 18, fol. 21). There were times when the grain would become clogged in the bins when it was being drawn off so that all of it would not run out. When that happened one of the sweepers would be sent into the bin by the foreman, or by order from the office, to clean it out. At the same time another man at the opening on the bin floor would lower a drop light into the bin and manipulate it so that the man in the bin could see to do the work. Only when the grain became clogged in the bins did the sweepers go in to clean them out, and then they were allowed to go in only when ordered to do so (R., p. 5, fol. 6; p. 13, fols. 15-16; p. 27, fol. 30; p. 28, fol. 31). The majority of the bins were self cleaning, and it very rarely happened that men were sent in to clean them (R., p. 30, fol. 34).

The pertinent events leading up to the accident are as follows:

On Tuesday, July 12, 1927, a Mr. Hubbell, representing the Air Reduction Sales Corporation, requested of Mr. Shanahan, the superintendent of the elevator, the use of a bin in the elevator with some grain to experiment with a preparation for the extermination of insects (particularly boll weevil) in grain (R., p.

22, fol. 25). The proposed experiment consisted of mingling a powder with the grain as it was run through the grain spouts into the bin. When in the bin the moisture in the grain coming in contact with the powder produced a gas which permeated the grain and was said to kill the weevil (R., p. 24, fol. 27).

Not having received any instructions from his superior, Shanahan asked if Hubbell had permission to make the experiment. Being informed by Hubbell that he had experimented in other elevators and receiving Hubbell's promise that he could and would procure letters from petitioner authorizing the experiment, Shanahan permitted Hubbell to proceed. Hubbell never produced the promised letter, and petitioner never in fact consented to the experiment (R., p. 22, fol. 25; p. 24, fol. 27).

Although Shanahan had full charge of the ordinary business operations of the elevator, he had no authority to authorize experiments by outside parties for their own purposes (R., p. 21, fol. 24; p. 31, fol. 35).

The grain experimented with was taken from storage bin 208 and run into storage bin 81 (R., p. 12, fol. 15; p. 56, fol. 64). As the grain passed through the spouts the powder was mingled with it (R., p. 24, fol. 27). There were no weevil in this grain and for the purpose of the experiment 40 small bags containing weevil were dropped at intervals into the grain as it passed into the bin (R., p. 23, fol. 26). This operation was completed on Tuesday afternoon, July 12 (R., p. 23, fol. 26; p. 25, fol. 28). The openings to the bin were covered, but the covers were not sealed (R., p. 24, fol. 27).

The treatment of this grain was solely for the purpose of the experiment and was not at all for preparing it for shipment. It needed no preparation, for there were no weevil in the grain except those put in by Hubbell for the experiment (R., p. 25, fol. 28; p. 57, fol. 64).

On Friday afternoon, after the grain had been in the bin 72 hours, it was drawn off from the bottom of the bin (R., p. 7, fol. 9; p. 18, fol. 20). As it was drawn off, the bags containing weevil were recovered for examination to ascertain the result of the experiment. One of the 40 bags was missing and Dillworth, the forman of the bin floor, was asked to open the bin and look for the bag. He removed one of the covers, lowered a droplight into the bin and looking through the opening discovered the bag lodged at a crossing of tie rods, about 5 or 6 rungs of the ladder from the bottom of the bin (R., p. 13, fol. 16; p. 17, fols. 19 and 20; p. 26, fol. 29). When Dillworth looked for the bag Ambrose, the decedent, was with him, and also looked into the bin. As Dillworth was bending over the opening looking for the bag he noticed an odor of gas. He told decedent to keep away from the bin as much as possible—not to hang around it; that he would not trust the stuff (meaning the gas), and that the gas was poisonous (R., p. 14, fol. 16; p. 15, fol. 17; p. 16, fol. 19; p. 60, fol. 68; p. 61, fol. 69). Neither Dillworth nor decedent was materially affected by gas in thus opening and examining the bin.

On Saturday morning, July 16, at about 8 o'clock, Dillworth, Fitzpatrick, and decedent went to work as

usual on the bin floor (R., pp. 20-21, fol. 23). These three were the only persons working on that floor that day (R., p. 12, fol. 14; p. 60, fol. 68). At that time all the covers were on the openings of bin 81 (R., p. 15, fol. 18). Fitzpatrick and decedent went to sweeping the floor. When decedent was last seen alive by either Dillworth or Fitzpatrick, he was sweeping. Fitzpatrick was working about 100 feet from bin 81 when he last saw decedent (R., p. 6, fol. 8; p. 19, fols. 21-22).

Dillworth went from his "shanty" on the bin floor to the first floor. When he returned to the bin floor all the covers were on bin 81 (R., p. 10, fol. 12). He went into his shanty and in about twenty minutes or more he heard a noise as of "something hitting." He went outside his shanty and saw that the cover of one of the spoutholes and the cover of the manhole of bin 81 were off, and that the cord of an electric droplight was hanging through the spouthole. He went to the bin, looked in, and saw decedent's body at the bottom. This was between 9:45 and 10 o'clock (R., p. 6, fol. 8 to p. 7, fol. 9; p. 8, fol. 10 to p. 10, fol. 12; p. 11, fol. 13 to p. 12, fol. 15; p. 44, fol. 50).

There was no stoppage or clogging of grain in bin 81; it ran out clean. There was nothing in the bin except the little bag of weevil. It was not necessary to remove it, and neither Hubbell nor petitioner desired its removal. Nothing was ever done to remove it. (R., p. 14, fol. 17; p. 15, fols. 17-18; p. 18, fol. 20; p. 26, fol. 29; p. 27, fol. 31).

Neither Dillworth nor Fitzpatrick removed the covers from bin 81 or lowered the droplight into that bin on the morning of the accident. They, with decedent, were all the workmen on the bin floor. Decedent was the only one who could have done this (R., p. 12, fol. 14; p. 60, fol. 68; p. 61, fol. 69; p. 62, fol. 70).

Dillworth did not direct decedent to enter the bin and did not know he was going to enter it (R., p. 14, fol. 16). On the contrary, as already pointed out, the undisputed evidence is that Dillworth repeatedly warned decedent to keep away from the bin, because the gas was dangerous.

On the morning of the accident no one requested or directed decedent or anyone else to do anything whatsoever with respect to bin 81. That bin was neither used nor intended to be used for any purpose on that day (R., p. 56, fol. 64; p. 57, fol. 65; p. 59, fol. 67; p. 63, fol. 70).

Dillworth, Fitzpatrick, and decedent, the only workmen employed on the bin floor, worked on that floor every day from Tuesday afternoon until the accident happened, about 9:45 o'clock Saturday morning—more than 3½ days—without being affected or inconvenienced at all by the gas except on Friday afternoon, when Dillworth removed one of the covers from bin 81 and bent over the opening looking for the missing bag (R., p. 61, fol. 69). Then he noticed an odor of gas and had a "sort of headache" (R., pp. 59-60, fol. 67; p. 62, fol. 70).

On Saturday morning, Dillworth first noticed that the covers were off bin 81 after he heard the noise as

of "something hitting." He had given no orders to remove these covers (R., p. 16, fol. 18). Immediately after that he discovered decedent's body in the bin.

Point I.

No Negligence Was Established Against Petitioner.

1. Petitioner did not authorize the experiment in which poisonous gas was used.

Hubbell deceived Shanahan and induced him to believe that petitioner had authorized or would approve the experiment. This was untrue.

While it appears that Shanahan was superintendent of the elevator and was in full charge of its ordinary business operations, there is no evidence that his authority extended to permitting experiments of the character performed by Hubbell, which had no relation whatever to petitioner's business, and Shanahan disclaims any such authority (R., p. 31, fol. 35). The grain was not infected, and without special authority he had no more right to permit such an experiment than he had to sell the elevator.

Not having authorized the experiment, petitioner is not liable for any results flowing therefrom.

2. Even if petitioner be held responsible for permitting the experiment, there was no negligence. The powder which was mingled with the grain harmed no one. The gas which was generated in the bin was equally harmless so long as the bin remained covered. This is demonstrated by the undisputed fact that the

three men who worked on the bin floor, of whom decedent was one, performed their usual work on that floor from the time the grain treated with the powder was run into the bin, on Tuesday afternoon, until 9:45 a. m. on Saturday, more than 3½ days, without the slightest injury or inconvenience from the gas (R., pp. 59-60, fols. 67 and 68; p. 62, fol. 70). Decedent was perfectly safe in the performance of his work so long as the bin was kept closed. On Friday afternoon, after the grain had been run out of the bin, Dillworth, looking for the missing bag, had removed a cover and he and decedent had both looked into the bin. Dillworth certainly, and doubtless decedent, when looking for the bag, had bent over the opening (R., p. 61, fol. 69). While the odor of the gas was quite noticeable, the effect upon them was slight (R., p. 60, fols. 67-68).

What had changed decedent's situation from one of entire safety to one of danger? Nothing but the removal of the covers from a spouthole, and from the manhole of bin 81, and doubtless decedent's entry into the bin. But the removal of the covers was not the act of petitioner, for neither Dillworth nor Fitzpatrick removed them, nor saw anyone remove them (R., p. 60, fol. 68; p. 61, fol. 69; p. 62, fol. 70). Twenty minutes before the accident both these covers were on (R., p. 10, fol. 12). These two men and decedent were the only persons employed on the floor at the time (R., p. 12, fol. 14; p. 60, fol. 68). Entering the bin was not only his voluntary act, but was wholly unnecessary, contrary to orders, and in spite of repeated warning (R., p. 13, fols. 15-16; p. 27, fol. 30; p. 14, fol. 16; p. 16,

fol. 19; p. 60, fol. 68). Petitioner did nothing to endanger decedent or render his place of work unsafe.

It is no answer to say, as was urged in the state courts, that these covers *might* have been displaced while decedent was sweeping over them, or that he *might* have been overcome by the gas while attempting to adjust them. The reasoning in support of each of these suggestions involves a presumption upon a presumption, which is not permissible. Where circumstantial evidence is relied upon, the circumstances must be proved, they cannot be presumed. *Price vs. N. Y. Central*, 92 N. J. Law at p. 432; *Manning vs. John Hancock Mutual Life Ins. Co.*, 100 U. S. at p. 697; *Chicago, &c., R. R. Co. vs. Coogan*, 271 U. S. at p. 477. True, in sweeping the floor, the men swept right over the manhole covers (R., p. 19, fol. 21). But there is no evidence that decedent was sweeping *over the covers* of bin 81 just prior to the accident. The fact that the sweepers at times swept over the manhole covers does not warrant a presumption that decedent swept over these particular covers on the morning of the accident. The suggestion that he did is mere conjecture, for no one saw what he was doing after about 9 o'clock (R., p. 6, fol. 8; p. 60, fol. 68). Even if the evidence warranted a presumption that decedent swept over these covers on the morning of the accident, it is not permissible to base on that presumption the further presumption that in so doing the covers were displaced, nor would it be permissible to draw from those two presumptions (if they existed) a third presumption that the cover being thus displaced, decedent was

overcome by escaping gas and was caused to fall into the bin. Had he been overcome while sweeping, he would have fallen on the floor. It is inconceivable that he would have fallen in such position as to pass through a spouthole only 17 inches in diameter or a manhole only 16¾ by 20 inches (R., p. 45, fols. 50-51).

There is no evidence whatever that either of these covers had become accidentally displaced. On the contrary, both were in place about 20 minutes before the accident (R., p. 10, fol. 12). There being no evidence of the accidental displacement of the covers, there can be no presumption that decedent was overcome while attempting to replace them. But the evidence absolutely negatives every one of the suggested presumptions. Photograph Ex. P-3 (opposite R. p. 69) shows how these covers are set into the cement floor and rest on shoulders so that they are level with the floor. It is apparent that it would be impossible to displace them from their position by sweeping over them. Add to this the undisputed facts that a droplight had been lowered into the bin; that neither of decedent's coworkers on that floor had displaced the covers or lowered the droplight, and the conclusion is irresistible that decedent himself had removed the covers, lowered the droplight, and entered the bin, and thereby had caused the accident, which otherwise would not have occurred (R., p. 60, fol. 68; p. 61, fol. 69; p. 62, fol. 70). Putting the case as strongly as possible for respondent, this conclusion is at least quite as probable as any suggested by respondent. In that posture of the case the judgment should be reversed.

Alvino vs. Public Service Ry. Co., 97 N. J. Law at p. 527.

There was no need for decedent to remove the covers from the bin or to enter it. There was no clogging of the grain in the bin; all ran out. The bin was entirely empty save for a little bag of weevil (R., p. 6, fol. 7; p. 14, fol. 17; p. 18, fol. 20). It was wholly unnecessary to remove this little bag. It is no way interfered with the use of the bin and neither Shanahan nor Hubbell desired its removal (R., p. 15, fol. 17; p. 26, fol. 29).

The rule of the floor was that none of the workmen should enter the bins unless ordered to do so by the foreman of the floor or the superintendent (R., p. 13, fols. 15-16; p. 27, fol. 30). Dillworth, the foreman, had not ordered decedent to enter the bin (R., p. 14, fol. 16). On the contrary, he had specifically ordered him to keep away from it and had warned him that the gas was poisonous (R., p. 14, fol. 16; p. 16, fol. 19; p. 60, fol. 68). In entering the bin without orders from his superior he violated the rule of the floor and the express order to keep away from the bin. He also disregarded the warning that the gas was poisonous.

3. There was no eyewitness to the accident; the evidence fails to disclose how it happened. What place he fell from, what he was doing at the time, and what caused him to fall are all left in the realm of speculation and conjecture. Speculation and conjecture cannot sustain the judgment. *Chicago, Milwaukee & St. Paul R. Co. vs. Coogan*, 271 U. S. 472 (at p. 478), and cases cited.

In *McCombe vs. Public Service Railway Company,* 95 N. J. Law 187 (N. J. Court of Errors and Appeals), an action was brought to recover for the death of one Saunders, plaintiff's intestate. His body was found lying on the defendant's track near midnight. He had suffered injuries from which he died. The motorman on the car following the one supposed to have injured the decedent discovered the body lying on the rail of defendant's track. One leg and one arm had been cut off, and the body was otherwise mangled. "There were no eyewitnesses to the accident. No one saw how it happened." The court held that the facts proved did not warrant a presumption of negligence on the part of the defendant and said (p. 189):

> "But the only presumptions of fact which the law recognizes are immediate inferences from the facts proved. *Price v. New York Central R. R. Co.,* 92 Id. 429. So, it has been said, mere theories and inferences do not authorize a verdict in a case of this nature, unless they are the only conclusions which can reasonably be drawn from the facts proven. Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence."

In *Adriance vs. Palisade Realty and Amusement Company, et als.,* 95 N. J. Law 185 (N. J. Court of Errors and Appeals), the plaintiff was riding in a "racer" operated by the Amusement Company within the boundaries of its park. With him in the car were two companions. An iron bar was placed in front of them and fastened to the car. Toward the end of the

second ride something happened and plaintiff ceased to remember anything. One of his companions spoke to him a few minutes before the accident. The next he saw was that "the plaintiff was doubled up, bleeding." Not one of the party saw the plaintiff struck or saw how he was injured. The Court said (p. 186):

> "The facts disclose an injury which is admitted, but do not disclose how it happened and no one gave any testimony on the point."

The Court also held that the maxim *res ipsa loquitur* was not applicable. On page 187 the Court used the following language:

> "If there is no proof of any fact by which the conduct of the defendant can be ascertained, there is nothing for a jury to pass upon. *Bahr v. Lombard, Ayres & Co., supra.*
>
> "The only presumptions of fact which the law recognizes are immediate inferences from the facts proved. *Price v. New York Central R. R. Co.*, 92 N. J. Law 429."

In *Alvino vs. Public Service Railway Company*, 97 N. J. Law 526, suit was brought to recover for the death of plaintiff's intestate arising out of a collision between a motorcycle and defendant's trolley car. No one testified to having seen or heard any collision. Decedent's wife testified that she saw him riding in the side car of the motorcycle. About a half hour later she heard of his injury. There was testimony to the effect that a motorcycle was found badly broken and two men were found unconscious on the roadside. The Court said (p. 529):

> "It may fairly be said from this testimony an inference of fact could be drawn that there was a collision between the motorcycle and the trolley car; but, if so, how it happened or who was responsible for the collision is left entirely to conjecture. The record is silent on these essential points."

To the same effect see:

Olsen v. Erie R. R. Co., 99 N. J. Law 485.

Patton v. Public Service Ry. Co., 227 Fed. 810 (C. C. A., 3d Circuit), at p. 812.

4. Under the Federal Employers' Liability Act, negligence must be established against defendant, otherwise there can be no recovery. *Seaboard Air Line R. Co. vs. Horten*, 233 U. S., p. 492; *Missouri Pacific R. R. Co. vs. Aeby*, 275 U. S. 426 (at p. 429); *Erie R. R. Co. vs. Winfield*, 244 U. S. 170 (at p. 172).

5. This case is brought under the Federal Employers' Liability Act and is governed by that act and by the principles of the common law as applied in the Courts of the United States. *Missouri Pacific R. R. Co. vs. Aeby*, 275 U. S. p. 426 (at p. 429); *Toledo, St. Louis & Western R. Co. vs. Allen*, 276 U. S., p. 165 (at p. 168).

6. This Court will examine the record and if found as a matter of law that the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of death, the judgment of the State Court will be reversed. *Chicago, M. & St. P. R. Co. vs. Coogan*, 271 U. S., p. 472 (at p. 474), and cases cited in that

opinion: *Gulf, M. & N. R. Co. vs. Wells,* 275 U. S., p. 455.

7. Not only did the respondent fail to fix negligence upon petitioner, but the evidence affirmatively demonstrated that it had been guilty of no negligence. Hence, petitioner was entitled to a judgment of nonsuit, and at the close of the case to a directed verdict.

8. Where there is but a mere *scintilla* of evidence, the State Court, in actions brought under the Federal Employers' Liability Act, is required to follow the rule established in the Federal Courts and order a nonsuit, or direct a verdict for defendant.

Baltimore & Ohio R. Co. vs. Groeger, 266 U. S. p. 521;

Gulf, M. & N. R. Co. vs. Wells, 275 U. S. p. 455;

Toledo, St. Louis & Western R. Co. vs. Allen, 276 U. S. p. 165;

Western & Atlantic R. R. Co. vs. Hughes, Admx., decided by this Court February 18, 1929, 73 U. S. Law Ed., Advance Opinions, March 1, 1929, page 268.

Point II.

At the Time of the Accident Decedent was not Engaged in Interstate Commerce.

Whether in sweeping the "bin floor" decedent was engaged in interstate commerce is immaterial. As we have shown under Point I (pages 13, 15 and 16 of this brief), his work did not require him to uncover bin 81 or enter it; on the contrary, by the rule of the floor

and by express order, he was forbidden to do so. In addition, he had been repeatedly warned of the poisonous nature of the gas. That he did remove the covers, lower the droplight into the bin and enter it is the only possible conclusion from the evidence, for neither of the other employees on that floor did so. The fact that the cover of a spout hole and of the manhole had been removed and that a droplight had been lowered into the bin through the spout hole renders any theory of the accidental removal of these covers impossible of belief.

All of these facts and circumstances show conclusively that decedent had abandoned his employment in interstate commerce, had departed from the duties required of him, and had voluntarily and unnecessarily entered into a place of danger where his duty did not call him and from which his orders required him to keep away.

If it be suggested that he entered the bin for the purpose of removing the little bag of weevil, respondent's case is not aided, for there was no necessity whatever to remove this bag from the bin.

In *Erie R. R. Co. vs. Welsh,* 242 U. S. 303, this Court said (page 306):

> "By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act. *Illinois C. R. R. Co. v. Behrens,* 233 U. S. 473, 478, 58 L. Ed. 1051, 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C 163, 10 N. C. C. 153."

To the same effect is *Minneapolis & St. Louis R. R. Co. vs. Winters,* 242 U. S. 353.

In *Krysiak vs. Penn. R. R. Co.,* 270 Fed. 758 (C. C. A. Third Circuit), plaintiff's intestate had been employed in interstate commerce during the day and in leaving his place of employment to go home chose a dangerous way instead of the safe way provided by his employers. While using that way he was injured.

The Court said (page 760):

> "At that moment, we think, Krysiak ended his employment and lost the status of an employe in interstate commerce. Later, when he was killed, he was not engaged in his employer's work, or in an incident to it, but was engaged in his own private concerns."

In *Harbor vs. Jenkins Rubber Co.,* 72 N. J. Law 171, plaintiff was returning to his place of work after the noon recess. He entered the premises at a proper place and was proceeding along a proper pathway when his attention was called to something glittering and he departed from that pathway for a distance of about fifty (50) feet to pick up this object. While off the pathway he was injured. Speaking of this deviation, the Court said (at page 174):

> "He was therefore neither working for the defendant company at the time nor proceeding to the place where he was to work with the intention of resuming work. When he deviated from the path, the use of which it might possibly be considered he was invited to make, he lost the protection of such implied invitation and became either a trespasser, or, at the most,

> a mere licensee, to whom the defendant company owed no duty except to abstain from willful injury."

The judgment of nonsuit was therefore affirmed.

In *Harris vs. U. S. S. Co.*, 75 N. J. Law 861, plaintiff decedent, a longshoreman, was assisting in unloading a vessel. While thus employed, it became necessary for him to have a shovel and he called to a coemployee, whose duty it was to supply tools for the longshoremen, to provide him with a shovel. Without waiting for the shovel to be brought, decedent left his place of work to procure a shovel for himself and while doing so fell into a coal hole and was killed. The Court said (at page 864):

> "When Harris, with such knowledge, of his own volition and without the knowledge of the defendant, departed from the safe place provided and occupied a dangerous place for the purpose of getting a shovel which the defendant was in the act of providing, he became either a trespasser, or, at the most, a mere licensee, to whom the defendant owed no duty except to abstain from willful injury, unless his action was justified by a custom of which the defendant knew or ought to have known."

There being no proof of such a custom, a judgment in favor of the plaintiff was reversed.

The burden is on respondent to prove that decedent was engaged in interstate commerce at the time of the accident. The record discloses nothing but speculation and conjecture with respect to what he was doing at that time.

Tested by the rule laid down in the foregoing cases, at the time of the accident decedent was not engaged in interstate commerce, or in any duty pertaining to his employment, and petitioner was not liable for the injuries sustained.

Point III.

Decedent's Injuries and Death Were Due to His Own Negligence.

For more than 3½ days during the experiment and after its completion decedent worked on the bin floor in entire safety. Had he not, outside of his duties, and in violation of his orders, uncovered the bin and attempted to enter it the accident would not have happened.

In *Davis vs. Kennedy*, 266 U. S. 147, this Court held that no recovery could be had under the Federal Employers' Liability Act for the death of an employee of the Railroad when his death was caused by his disobedience of orders.

To the same effect see *Unadilla Valley Ry. Co. vs. Caldine, Adm'r*, decided by this Court December 10th, 1928, reported in Law Edition December 15th, 1928, page 102.

In *Mehl vs. Glucose Co.*, 83 N. J. Law, page 630, the Court said (at page 631):

> "When an employer forbids his employee to do a certain act in connection with the machine on which he is working, and the employee, while violating such prohibition, and as a result there-

from receives an injury, the employer is not liable. *Card v. Wilkins,* 32 Vroom 296."

We respectfully submit that, for the reason stated, the judgment should be reversed.

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